United States Department of the Interior

BUREAU OF LAND MANAGEMENT
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Billings, Montana 59107-6800
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In Reply To:

SDR-922-02-04
MTM-1578
MTM-01903A
MTM-13816
MTM-13818
MTM-16102
MTM-84559
MTM-89082
MTM-89474

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July 3, 2002

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

DECISION

Dennis Tighe
Montana Wilderness Association
Island Range Chapter
1400 First Ave. No. 30
Great Falls, Montana 59401

SDR-922-02-04

AFFIRMED

The Montana Wilderness Association (MWA) requests a State Director Review (SDR) of the May 10, 2002, Decision Record and Finding of No Significant Impact (Enclosure 1) approved by the Bureau of Land Management (BLM) Great Falls Field Station Supervisor. Since the May 10, 2002, Decision is based on an environmental assessment (Enclosure 2), prepared in response to the filing of six Applications for Permit to Drill (APDs) by Macum Energy, Inc., two APDs by Klabzuba Oil and Gas, Inc., and one APD by Ocean Energy Resources, Inc., under 43 CFR 3162.3-1, it is subject to this review according to 43 CFR 3165.3(b).

The SDR request was considered timely filed on June 4, 2002, in accordance with 43 CFR 3165.3(b), and assigned number SDR-922-02-04 (Enclosures 3).

BACKGROUND

This section provides information about BLM's management direction for the project area. Additional information is also included about the public involvement process used for the environmental assessment (EA) that is under review in this SDR.

Oil and Gas Leases

The oil and gas leases for these APDs were issued in the late 1960s/early 1970s with the exception of MTM 84559, issued effective November 1, 1995; MTM 89082, issued effective May 1, 1999; and MTM 89474, issued effective November 1, 1999. Acreage amounts contained within the leases vary from 200 to 2,562. All of the leases contain standard lease terms. Additional stipulations apply to the leases issued in 1995 and 1999 according to management direction and Decisions from the 1988 West HiLine RMP.

Upper Missouri River Breaks National Monument (UMRBNM)

On January 17, 2001, President Bill Clinton created the Upper Missouri River Breaks National Monument (UMRBNM) under the Antiquities Act of June 8, 1906. With respect to BLM's management of oil and gas leases the proclamation states:

> "The federal lands and interests in lands within the boundaries of the monument are withdrawn from entry, location, selection, sale, leasing, or other disposition under the public land laws, including but not limited to withdrawal from location, entry, and patent under the mining laws and from disposition under all laws relating to mineral and geothermal leasing, other than by exchange that furthers the protective purposes of the monument. The establishment of the monument is subject to valid existing rights. The Secretary of the Interior shall manage development on existing oil and gas leases within the monument, subject to valid existing rights, so as not to create any new impacts that would interfere with the proper care and management of the objects protected by this proclamation."

Six of the nine APDs are within the UMRBNM boundary

State Director's Interim Guidance (Enclosure 4)

In June 2001, the State Director issued interim guidance for managing the UMRBNM while a monument plan was being written. This guidance follows the Proclamation, Secretary of the Interior direction for management of the monument, BLM's Interim Policy for Newly Created Monuments, and the consensus recommendations of the Central Montana Resource Advisory Council.

Upper Missouri River Breaks National Monument Resource Management Plan (RMP)

A notice of intent was issued on April 24, 2002, to start the Upper Missouri River Breaks National Monument RMP. This plan is scheduled for completion in June 2005.

EA Process

On January 15, 2002, the BLM released the Macum/Klabzuba/Ocean Energy Natural Gas Project EA to the public for a 30-day review period. Approximately 405 copies of the EA were distributed to federal, state, and local government agencies, organizations, interest groups and individuals. Public meetings were held in Great Falls and Havre, Montana. A total of 36 comment letters were received during the 30-day public comment period. The comments were analyzed and considered before the Decision Record and Finding of No Significant Impact (FONSI) was issued to the public on May 10, 2002.

STATE DIRECTOR REVIEW POINTS

The issues raised in MWA's SDR are enumerated below, followed by the appellant's findings and supporting arguments in italicized text and our

response to the substantive issues

1. THE LEASES CANNOT BE LABELED AS "VALID" BECAUSE THE BLM HAS NEVER DETERMINED THEIR VALIDITY UNDER PROPER BLM REGULATIONS.

a *The MWA argues,*

"Before any development of APD's can occur within the Monument boundary, the validity of leases must be verified. Before the validity of the leases may be determined, the BLM must accumulate the necessary data and apply its own regulations. The BLM cannot presume which leases are valid without proper data and investigation. Determining the validity of leases is a task that must precede any development including the nine leases here and should be done in the context of the management plan. There needs to be a thorough economic analysis of whether the leases and the leases holding the "pre-NEPA" leases are capable of producing gas in paying quantities."

The NEPA and its implementing regulations do not specifically require the BLM to make a lease validity determination every time it contemplates a proposed action on existing leases. Although this issue is the heart of MWA's SDR request, we find no compelling argument to conclude that this type of review is required as either a prerequisite to preparing a NEPA document or during NEPA document preparation.

However, the BLM does have responsibilities to properly manage existing leases, including the management of leases beyond their primary terms. Our review of the record demonstrates that the BLM has complied with its own regulations to meet these management responsibilities. The "pre-NEPA" leases referenced by MWA are in their extended terms. In accordance with 43 CFR 3107.2-1, "A lease shall be extended so long as oil or gas is being produced in paying quantities." The leases in question were all determined to be capable of producing oil or gas in paying quantities. As wells are drilled and completed, the operators provide information to the BLM regarding the well's producing capabilities. The BLM analyzes the information and determines if the well is capable of producing oil or gas in paying quantities. If the well is determined to be capable of producing in paying quantities and is the first well on a lease, a First Production Memo is prepared stating that the well is capable of production in paying quantities. The First Production Memo is the method used to transfer leases from non-producing status to producing status. First production notifications were prepared for all of the leases in question (Enclosure 5).

Once a lease is determined to be capable of producing in paying quantities, it is extended until a determination is made that the lease is no longer capable of producing in paying quantities. The BLM monitors the production from all leases by reviewing the Monthly Reports of Operation. If this monitoring indicates that a lease may no longer be capable of producing in paying quantities, the BLM will notify the operator of the determination. The monitoring of the leases in question has not indicated that any of the leases are no longer capable of producing in paying quantities. This issue was addressed in response to comments received on the EA. In response to comment L1, it was stated in Appendix B of the Decision Record (Enclosure 1, pages 25 and 26), " BLM has periodically performed a review of each of the subject leases consistent with 43 CFR 3107.2-3, Leases Capable of Production. In

February 2002, all the leases within the Monument were reviewed and were determined that they continue to remain in good standing."

Also, it is important to note that a lease cannot terminate until the operator has been notified by the BLM that the lease is not capable of producing in paying quantities. The regulations at, 43 CFR 3107.2-2 state:

> "A lease which is in its extended term because of production in paying quantities shall not terminate upon cessation of production if, within 60 days thereafter, reworking or drilling operations on their leasehold are commenced and are thereafter conducted with reasonable diligence during the period of non-production. The 60-day period commences upon receipt of notification from the authorized officer that the lease is not capable of production in paying quantities." (emphasis added).

No notifications have ever been sent on these leases

> *The MWA continues this argument with charges that the BLM has not properly monitored or analyzed the leases in question.*

"The leases listed in the Decision Records (DR) are not valid because the BLM has never determined their validity. The leases have not been monitored to determine whether they have been held by production. The paying quantities requirement of pre NEPA communitized leases has never been verified. The leases listed in the DR are not now valid. All the pre-NEPA Communitization leases should have been terminated long ago because their has been no verification of lease extensions, no determination of whether shut in wells were capable of producing in paying quantities, no analysis of whether producing wells were producing in paying quantities and no analysis of declining production. The analysis necessary to meet the mandate of the Oil and Gas Handbook to monitor production and cessation of production has not been done."

As stated above, the leases in the DR have been monitored and verification of their ability to produce in paying quantities was completed in February 2002. The "pre-NEPA" leases were all determined to be capable of producing in paying quantities, and First Production Memos were completed thus extending the leases. Some of the leases are committed to communitization agreements. Monitoring has taken place, and no leases or communitization agreements have been determined to not be capable of producing in paying quantities. Therefore, as stated above, these leases are valid.

c *The MWA also argues about requirements specific to paying well determinations under unit agreements.*

"The guidelines for determination of production in paying quantities is not a mystery. Kerr-McGee Oil Industries, Inc., et al., A-30481, I.D. 110 (1996). Paying well determinations under a unit agreement must also include the capability of the well to recover drilling and completion costs. No determination of these costs is included in the EA or DR. In order for a lease to be continued by production, the unit must contain a well capable of producing. United Manufacturing Company et al., A-27608, 65 I.D. 106 at 111-115 (1958). That determination must be made prior to the expiration of the primary term of the lease."

We agree that paying well determinations under a unit agreement must also include the capability of the well to recover drilling and completion costs. Only one of the leases (MTM1578) within the proposed action is committed to a unit agreement (Sherard Unit, Eagle Participating Area E). The unit well (#6-28) on this lease was determined paying on a unit basis; i.e., the determination included the drilling and completion costs in 1977.

We also agree that a lease must contain a well capable of producing to be continued. As stated above, all of the "pre-NEPA" leases in question are in their extended terms. All of the leases were determined to be capable of producing in paying quantities.

The MWA lists some examples showing why it feels the leases are not valid and should have been terminated long ago. As stated above, all of the leases in question have been reviewed and have been determined to be in good standing. As stated above, all of the leases in question have been determined to be capable of producing in paying quantities. They all remain in good standing, and are considered valid.

d) The MWA claims the BLM should analyze the potential impact of an undecided lawsuit (i.e., Montana Wilderness Association v. Tom Fry, et al., CV-00-039-GF-PGH) or disclose how the lawsuit may affect other Federal oil and gas leases that are not included in the lawsuit.

This issue was also included with comments on the EA. The Great Falls Field Station Supervisor properly responded to this comment and limited the EA analysis to the direct, indirect, and cumulative impacts of the proposed action and reasonable alternatives (Enclosure 1, page 26). The NEPA and its implementing regulations do not require analysis of potential unknown consequences of undecided judicial action, or disclosure of this type of information in an agency Decision Record.

2. IT IS IMPROPER TO PROCEED WITH THE PROJECT BEFORE DEVELOPING THE MONUMENT MANAGEMENT PLAN, AND FAILURE TO DO SO DEMONSTRATES THAT THERE IS AN INADEQUATE RANGE OF ALTERNATIVES

a) MWA states

"According to the Monument Proclamation, the goal of the BLM is to protect and preserve the resources and objects described in the Proclamation subject to valid, existing rights."

The remainder of MWA's argument centers on BLM's decision to proceed with the APDs without first creating the EIS for the Monument Management Plan. The MWA claims the subject EA is flawed because it did not consider an alternative that analyzes the effect of approving the APDs before completion of the Monument Management Plan, or an alternative that denies the APDs pending completion of the Monument Management Plan. The MWA states the alternative for development of the APDs within the Monument boundary wrongfully avoids the broader analysis required for the management plan and presupposes that field development will occur because these APDs are the first step.

These issues were also included with comments on the EA. Responses to these issues are included on pages 16, 19, 20, and 21 of Enclosure 2. We find no reason raised by the appellant or by reviewing the record to agree that another alternative is required to consider what the environmental impacts would be if the APDs within the boundaries of the monument were denied, or suspended pending completion of the Monument RMP. The subject EA analyzes the proposed action and no action alternatives. It also considers additional alternatives and includes reasons why these other alternatives were not analyzed in detail. The relevant environmental impacts from denying the APDs, in part, or all, are already included in the subject EA under the No Action Alternative.

The substantial National Environmental Policy Act issue raised by the MWA in this contention is whether or not BLM's action under review in this SDR is in compliance with 40 CFR §1506.1. This section of the regulations applies to the May 10, 2002, Decision because the Monument RMP was started on April 24, 2002, and as previously stated, a Record of Decision will not be completed until 2005.

The BLM's Interim Guidance for the Monument allows approval of APDs before completion of the Monument RMP. This interim guidance was developed with public involvement, including participation by the MWA. The purpose of completing an oil and gas field development plan as part of the Monument RMP is to address actions necessary to protect the objects identified in the proclamation. The FONSI for the subject EA concludes that the proposed action will not create any new impacts that would interfere with the proper care and management of the objects identified in the UMRBNM proclamation. This conclusion is supported by the findings in the EA (pages 31-36 of Enclosure 2). The MWA's SDR request does not include any substantive reasons why they believe the Great Falls Field Station Supervisor's Decision would result in significant impacts. We find no compelling argument to disagree with the findings of the FONSI. Therefore, the May 10, 2002, Decision to approve all of the APDs included in the proposed action, except for Well #23-10 that is on a lease involved in a pending lawsuit (i.e., Montana Wilderness Association v. Tom Fry, et al., CV-00-039-GF-PGH) properly complies with 40 CFR §1506.1. As mentioned by the appellant on page 9 of the SDR, the BLM will not approve any more APDs within the monument boundary until after completion of the Monument RMP. This statement refers to "additional" APDs. The term "additional" means APDs that are not covered by the EA under review in this SDR that could be proposed before completion of the Monument RMP. The BLM believes that completion of the APDs under review will provide sufficient geologic data to proceed with a meaningful analysis of field development in the Monument RMP. We also conclude that the APDs approved on May 10, 2002, satisfy the State Director's Interim Guidance to, "...honor existing leaseholders rights, avoid any significant commitment of resources before the monument RMP is completed, and acquire additional geologic data for preparation of the field development plan."

b) Appellant argues that the BLM should analyze an alternative that considers forfeiting or buying leases and compensating owners.

The public asked the BLM to consider this type of alternative in comments on the EA. A response to this comment is found on page 20 of Enclosure 1. We agree with this response. In addition, the authority for any of the lessees to consider forfeiting leases in anticipation of compensation, and to empower the Secretary of Interior to implement it would have to come from Congress and the President in the form of enacted law.

In addition, as previously stated in the response to this comment, consideration of this type of alternative is contrary to all existing planning direction to manage development of existing oil and gas leases including the UMRBNM proclamation and Montana State Director's Interim Guidance (Enclosure 5).

c) *The appellant states the no action alternative has little, if any, substantive analysis, and neither alternative has any discussion of a cost-benefit analysis as required by NEPA.*

This is one of several places the appellant claims a cost-benefit analysis is required. The appellant also includes this same claim as a separate argument (i.e., No. 4) in the SDR. Our response to the claim that NEPA requires the BLM to complete a cost-benefit analysis is found on page 8 of this SDR.

The EA does include a no action alternative and it is analyzed. The Great Falls Field Station Supervisor has properly considered the no action alternative.

d) *The appellant claims the EA fails to analyze the potential development of shut-in wells and this omission is an example of piecemeal development that prevents an adequate analysis of cumulative effects. The MWA claims the BLM must prepare an EIS for the project area because the project is a precursor to additional gas development actions. Appellant also claims the BLM acted in an arbitrary and capricious manner by including all nine wells within a single analysis area.*

The question about analyzing shut-in wells is also addressed in response to comments on the EA (Enclosure 1, page 24). The EA does include analysis of potential development of shut-in wells as connected actions, including pipelines needed to produce shut-in wells. The EA also includes the development of shut-in wells as part of the cumulative impact analysis (Enclosure 2, pages 36-40). The Great Falls Field Station Supervisor properly considered the cumulative impacts of the proposed action including reasonably foreseeable development activities, and this consideration still resulted in a FONSI. We find no reasons upon review of the record or in the appellant's argument to disagree with the May 10, 2002, FONSI determination.

Again the analysis area question is addressed in response to comments on the EA (Enclosure 1, page 18). The appellant does not provide any reasonable alternative to the analysis area size or geographic extent except to divide the APDs into smaller groups or use a smaller analysis area. We find this suggestion which might result in piecemeal analysis of the proposed action odd, especially since the appellant contends the EA fails to analyze cumulative impacts. The analysis area identified in the EA is reasonable, it includes the majority of lands with existing Federal oil and gas leases within the monument boundary, and it helps address potential cumulative impacts.

e) *The MWA believes the access routes for the project APDs and improvements to access routes will affect future management of the Monument and that the BLM should do an EIS now to study travel management. The appellant claims the BLM is committing resources to projects which have not been fully analyzed and that BLM has failed to analyze future actions, leaving the EIS analysis to another time. The MWA states;*

"The DR states that issues regarding rights of way for roads and pipelines will be analyzed later. The Proclamation and NEPA do not permit this analysis to wait if the project will affect transportation and roads."

This argument is premised on the MWA's claim that the DR states issues regarding rights-of-way for roads and pipelines will be analyzed later. This contention is false. Page 3 of the EA (Enclosure 2) specifically states that the impacts of pipelines are considered in the EA. This question is also addressed in response to comments on page 25, and on pages 27 through 31 of the DR (Enclosure 1).

Onshore Oil and Gas Order Number 1, 48 F.R. 48916, October 21, 1983, does not require a Federal lessee or operator to provide the specific location of production facilities if such information is unknown and cannot be accurately presented. The EA recognizes that pipelines are connected actions in this case because of the potential for successful well completions. One pipeline route was not considered in detail in the EA because of potential impacts (Enclosure 2, page 11). Other reasonable pipeline routes and actual road access routes for all of the proposed wells are considered and analyzed in the EA. The EA also considers reasonable projections for access road and pipeline construction as part of the cumulative impact analysis. The EA does consider cumulative impacts, including impacts from potential future actions, and how such impacts may affect travel management (pages 27, 28, 30, and 31 through 40).

3. THE EA PROVIDED MISLEADING AND INADEQUATE INFORMATION TO THE PUBLIC

The MWA points out that the EA originally included one lease (MTM 016103) but in its final form included lease MTM 001903A, which is a different lease. This claim also describes the acreage differences between the two leases and argues this information needs to be accurate for informed public participation.

We agree the EA originally included MTM 016103 incorrectly and the DR available to the public on May 10, 2002, included the correct lease on an errata sheet (page 39 of Enclosure 1). We also agree that these two leases are different in terms of their geographical size. This is where the differences start and stop.

The well site included in the EA has not changed. It is located on private surface estate and Federal mineral estate, and is subject to the terms of a Federal oil and gas lease. Although these are two separate leases, they share the same geographic location and have a common boundary. Both leases include private surface estate and surface estate managed by the BLM. Both leases are also on lands outside of the UMRBNM, except for 30 acres of lease MTM 016103

that is within the UMRBNM. The two leases in question include similar lease terms for protection of the environment and neither lease includes any lease stipulations to modify the lease terms (Enclosures 6 and 7). We find no critical differences between these two leases that would have a bearing on environmental issues or informed public participation.

4. THE BLM FAILED TO PROVIDE A COST-BENEFIT ANALYSIS

The MWA claims federal law requires a cost-benefit analysis for this project. Appellant argues this claim with references to Section 102 of NEPA, its implementing regulations and judicial cases. This argument concludes: "The public has no accurate information upon which to gauge the usefulness of the proposed action without the analysis and, therefore, the EA is flawed and must be redone."

This claim was also included in comments on the EA and in the BLM's response to comments on page 24 of Enclosure 1. The appellant claims an analysis is necessary to determine if the leases are capable of producing gas in paying quantities, and this analysis is needed to determine if the alleged benefit of the action outweighs the cost. Our response to allegation number 1 addresses appellant's arguments about BLM's actions concerning monitoring existing leases and determinations about the capability of such leases to produce gas in paying quantities.

Under NEPA, and 40 CFR § 1502.23 BLM is not required to complete a cost-benefit analysis. This section of the regulations for implementing the procedural provisions of the NEPA states:

> "For purposes of complying with the Act, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations."

The EA does include many important qualitative factors, including the objects protected by the UMRBNM proclamation. The Great Falls Field Station Supervisor properly considered factors that are likely to be relevant and important to a decision concerning APDs for development of existing federal oil and gas leases in and adjacent to the UMRBNM. We find no reason to require preparation of a monetary cost-benefit analysis in this case.

DECISION

After careful review of the SDR, I affirm the May 10, 2002, Decision Record and Finding of No Significant Impact approved by the BLM Great Falls Field Station Supervisor. The Great Falls Field Station Supervisor completed a careful review of environmental issues, identified all relevant environmental concerns, and correctly determined an EIS was not necessary. The scope of the project is appropriate. The analysis of the environmental impacts from the project is comprehensive and its conclusions that these impacts, as the project is designed are not significant is correct. The determination that the proposed action will not create any new impacts that would interfere with the proper care and management of the objects protected by the UMRBNM proclamation is reasonable.

The MWA also requests a stay of the May 10, 2002, decision until: 1) a determination is made concerning lease validity; 2) the outcome of Montana Wilderness Association v. Tom Fry, et al., CV-00-039-GF-PGH; and 3) completion

of the UMRBNM RMP. This request also includes a request to set aside the EA, issue orders to the BLM to comply with its own procedures, and stay future oil and gas activities. Our review of the MWA's specific arguments concerning lease validity, the pending lawsuit, and ongoing RMP does not convince us there is any reason to grant a stay, set aside the EA, or issue special orders to comply with lease monitoring procedures.

The Great Falls Field Station Supervisor correctly deferred making a decision on the one APD included in a lease subject to Montana Wilderness Association v. Tom Fry, et al., CV-00-039-GF-PGH. The May 10, 2002, also complies with the UMRBNM proclamation and State Director's Interim Guidance. Finally, the actions authorized by the May 10, 2002, EA will not result in any irreparable harm; therefore the request for a stay is denied.

This Decision may be appealed to the Board of Land Appeals Office of the Secretary, in accordance with the regulations contained in 43 CFR 4.400 and Form 1842-1 (Enclosure 8). If an appeal is taken, a Notice of Appeal must be filed in this office at the aforementioned address within 30 days from receipt of this decision. A copy of the Notice of Appeal and of any statement of reasons, written arguments, or briefs must also be served on the Office of the Solicitor at the address shown on Form 1842-1. It is also requested that a copy of any statement of reasons, written arguments, or briefs be sent to this office. The appellant has the burden of showing that the Decision appealed from, is in error.

If you wish to file a Petition for a Stay of this Decision, pursuant to 43 CFR 3165.4(c), the Petition must accompany your Notice of Appeal. A Petition for a Stay is required to show sufficient justification based on the standards listed below. Copies of the Notice of Appeal and Petition for a Stay must also be submitted to each party named in this Decision and to the Interior Board of Land Appeals and to the appropriate Office of the Solicitor (see 43 CFR 4.413) at the same time the original documents are filed with this office. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

(1) The relative harm to the parties if the stay is granted or denied,
(2) The likelihood of the appellant's success on the merits,
(3) The likelihood of immediate and irreparable harm if the stay is not granted, and
(4) Whether the public interest favors granting the stay.

In case of an appeal the adverse parties to be served are

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